

No. 12,145

IN THE

United States Court of Appeals  
For the Ninth Circuit

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W. M. (alias Bill) GILLIS,  
*(Plaintiff) Appellant,*

vs.

BEN F. GILLETTE and  
IRENE GILLETTE,  
*(Defendants) Appellees.*

BRIEF FOR APPELLANT.

(Plaintiff's Second Appeal.)

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C. C. TANNER,

Box 27, Nome, Alaska,

*Attorney for Appellant.*

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PAUL P. O'BRIEN



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**I. JURISDICTION.**

This action was brought in the District Court of the Territory of Alaska to foreclose a mechanic's and materialman's lien.

48 *U. S. C.* Sec. 101,

"There is established a District Court for the Territory of Alaska, with the jurisdiction of District Courts of the United States and with general jurisdiction in civil, criminal, equity and admiralty cases. \* \* \*"

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(NOTE): Whenever emphasis is used in this brief, it has been added by the writer.

Compiled Laws of Alaska, 1933, Sec. 1994 (now C. L. A., 1949, Sec. 26-1-13),

“Actions to enforce the liens created by this code shall be brought before the district court, \* \* \*”

28 U. S. C. Sec. 1291,

“The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, The District Court for the Territory of Alaska, \* \* \* except where a direct review may be had in the Supreme Court.”

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## II. STATEMENT OF THE CASE—EXPLANATION.

Appellant, W. M. (alias Bill) Gillis, filed a lien on certain real property of the appellees, located in the Town of Nome, Alaska, and thereafter commenced an action to foreclose said lien under the provisions of Alaska statutes. Appellees answered and cross-complained, and appellant made reply.

The case came on for hearing by the Court, without a jury, on the 26th day of December, 1947. The Court reserved decision until the 29th day of March, 1948, at about which time a memorandum of findings and conclusions was served upon counsel for appellant. Counsel for appellees having died meanwhile, appellant's counsel applied on the 26th day of July, 1948, to the United States Court of Appeals for the Ninth Circuit for an alternative writ of mandate directed to the trial judge requiring him to make findings of fact, conclusions of law, and enter judgment or to

show cause why he did not do so. Said writ was issued and made returnable in the City of San Francisco. Thereafter, on the 27th day of August, 1948, the trial Court made and entered findings of fact, conclusions of law, and judgment. Appellant then took an appeal to the U. S. Court of Appeals for the Ninth Circuit (No. 12,145), mainly upon the contention that the trial Court's conclusions and judgment were not consistent with his findings of fact. Thereafter, an opinion was rendered by the Appellate Court and the case remanded to the trial Court with directions to enter further findings with leave to amend the conclusions and judgment to conform therewith. The trial Court made and entered further findings, conclusions, and judgment on the 2nd day of December, 1949. Appellant then took this appeal.

In this second appeal questions of fact arise which were not issues in the first appeal; therefore, emphasis in this brief will be placed upon the evidence introduced at the trial of the cause and points not covered in the former briefs filed. It is respectfully requested that this brief be considered in connection with and supplementary to the former briefs.

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### III. SUMMARY OF QUESTIONS INVOLVED.

It appears from appellant's statement of points in this second appeal (Transcript of Record, page 227) that the pertinent questions involved in this appeal may be summarized in the following manner:

1. Assuming the trial Court's findings to be true, are the conclusions reached and judgment rendered legally justified therefrom?

2. Does the evidence taken at the trial of this cause justify the conclusion reached by the trial Court that a completed contract or agreement was entered into between appellant and appellees wherein appellant bound himself to perform certain work and labor for the appellees within a specified time and for a definite consideration?

3. Does the evidence justify the conclusion reached by the trial Court that the appellant furnished materials and labor to the appellees by virtue of separate agreements?

4. Does the evidence justify the conclusion reached by the trial Court that appellant wilfully and without cause abandoned the work being performed for appellees?

5. Does the evidence justify the result reached by the trial Court that the plaintiff (appellant) is not entitled to compensation for labor performed?

6. Does the evidence justify the trial Court in disallowing a foreclosure of plaintiff's lien and a disallowance of attorney's fee and costs?

#### IV. ARGUMENT.

##### A. ANALYSIS OF COURT'S FINDINGS, CONCLUSIONS, AND JUDGMENT.

The Court found (Transcript of Record, page 44) that on August 8, 1946, agreement was entered into.

The testimony of plaintiff (appellant) Gillis and defendant (appellee) Mrs. Gillette agrees that August 8 was the probable date of their first negotiations and that negotiations continued for several days before plaintiff was authorized to do any work by virtue of these negotiations. (The testimony set out following this analysis makes this very clear.)

The Court found (Transcript of Record, page 44) that the plaintiff abandoned the work September 15, 1946, then again found (Transcript of Record, page 46) that in the latter part of January, 1947, "that he then quit and withdrew from the premises".

The uncontradicted testimony of Gillis (Transcript of Record, page 63) is that work ceased December 16, 1946.

The Court found (Transcript of Record, page 45) that "as a separate agreement" materials were furnished to the defendants by the plaintiff, then in the same paragraph finds that these materials were "actually furnished by the defendants."

*The Court fails to make any mention of the labor performed for the defendants.*

The Court states in his conclusions (Transcript of Record, page 50) that the plaintiff is liable in the sum of \$100.00 "for wantonly cutting off the corner

of defendants' dwelling house and wilfully failing to replace the same." Yet, in his original findings and conclusions (Transcript of Record, page 23) he finds "The plaintiff is *not* shown to be responsible for cutting off one corner of the dwelling house for which defendants claim One Hundred (\$100.00) Dollars."

In the trial Court's conclusions (Transcript of Record, page 50) he has repeatedly used the words "wantonly" and "wilfully". These terms are, in the main, not used in his findings nor were they used at all in his initial findings and conclusions filed in this Court on first appeal. (Transcript of Record, beginning page 20.) We believe this to be not only lacking of good form, but contrary to the evidence produced at the trial of the cause and that only one conclusion can be drawn from such action, namely, that the trial Court is attempting to show bad faith on the part of the plaintiff (appellant) and discredit his testimony before this Court. We submit that a careful examination of the testimony taken at the trial of this cause will show such inference unfounded.

**(1) Conclusions and judgment inconsistent with findings.**

Assuming for purpose of this analysis only that the trial Court's findings are true, the conclusions and judgment can not be justified. In effect, the Court has decided that, inasmuch as "plaintiff's abandonment of the work was wilful and without cause," he thereby not only loses any balance due him for labor under the alleged contract, but, in addition, he must *further enrich the defendants by paying them to complete the unfinished work.*

The defendants in their cross-complaint (Transcript of Record, page 14) claim only the difference between the alleged contract cost of labor and their alleged damages, and with no prayer for general relief. Counsel has been unable to find any legal or equitable support for the trial Court's arbitrary holding.

"If a party who agrees to perform services of labor abandons the contract after part performance, the other party may recover for any excess in the cost of doing the remainder of the work *over what he would have paid under the contract.*"

15 *Am. Jur.—Damages*, Sec. 45.

"generally speaking, *the motive of the defendant in breaking a contract is immaterial and cannot be inquired into on the question of compensatory damages.*"

15 *Am. Jur.—Damages*, Sec. 48.

## **(2) Amount of damages inconsistent with evidence.**

In the trial Court's Conclusions of Law, Paragraph III (Transcript of Record, page 49), we find damages have been awarded the defendants for failure to complete full concrete basement, \$327.50, and for leaving house unbraced, \$190.00.

Each award is not consistent with the evidence introduced at the trial of this cause. In the matter of the concrete basement, the defendants failed to establish the actual or reasonable value of the cement job. We quote from the testimony of Mr. Gillette under direct examination (Transcript of Record, page 173):

“Court. Just a minute—it seems to me that the reasonable value of this should come from one whose skillfulness and ability is established.

Mr. Cochran. All right. What was the size of the basement floor?

A. It was 24x30.

Q. And what thickness was the floor?

A. I put it down four inches thick—cement.

Q. Can you give me approximately the number of hours you put in in thawing, and the basement floor preparing to put in the cement, and putting it on? Putting the cement on?

A. Oh, about 160 hours.

Q. Do you know what is paid regularly in Nome for that character of work?

A. *I don't know.*”

*The record fails to disclose any other competent evidence to establish the value of doing the cement work.*

Following we quote testimony in the matter of costs for bracing house (‘Transcript of Record, page 176):

“Court. The question was how much does that bill show for putting in the posts.

A. 47 hours at \$1.75 an hour.”

Therefore, *the actual cost of this job was \$82.25.* The only other testimony in respect to this item of damages was given by Mrs. Gillette (‘Transcript of Record, page 140). We respectfully invite the Court to turn to this testimony to get further light in respect to damage award errors made by the trial Court.

The foregoing is considered sufficient to suggest that in making the awards the trial Court has taken his

figures from the figures set out in defendants' cross-complaint (Transcript of Record, page 12) and *not from the evidence.*

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## B. THERE WAS NOT A COMPLETED AGREEMENT.

### Negotiations.

#### Defendants' Exhibits 1 and 2.

A careful reading of the transcript of testimony in this cause (Transcript of Record, beginning page 59) will show that the only written evidence upon which the trial Court could possibly base his findings of a completed contract or agreement are defendants' exhibits 1 and 2. It is submitted without further argument or proof that these exhibits considered by themselves cannot by any legal stretch of the imagination be deemed a contract, although defendants' counsel throughout the trial of the action contended so.

Original negotiations in this matter were between defendant, Mrs. Gillette, and plaintiff, Gillis. We will let them speak for themselves.

Direct testimony of Mr. Gillis (Transcript of Record beginning page 61):

“A. On or about August 8th, I was working on the Masonic Temple over there and Mrs. Gillette came over to see me there and talked to me about this job. I told her at the time that we did not have time to do it. She was quite insistent about it, and said they had to get off of the beach and one thing and another, and I explained to her that we had contract work that we had to do and that we couldn't do it—that we simply had too much

on the schedule, and that with the labor conditions as they were at the time, it was almost impossible to get men and that we did not have enough men. Later she talked to me about it and I told her if we did it at all, *it would have to be done between other jobs, but that I would try to get the house off of the beach before the fall storm; but outside of that—well, we could not drop other work and go ahead with that.*

Q. You were under contract, were you, at that time, for other jobs?

A. I was.

Q. Well, go ahead, Mr. Gillis, and tell us about any other negotiations prior to that time.

A. They wanted to know approximately what it would cost. I could not furnish them the exact cost. *I gave them an approximate cost on it which at that time, they thought was too much. They did say they would have the forms in ready for me to pour when we were ready. I told them if it could be worked out so it was ready, I could work the same crew. She said they would have the forms ready. Well, we waited quite awhile, but the forms were not ready and finally I went to Mr. Gillette and asked him what the score was going to be on it and he advised us to go ahead and put in the forms and go ahead with the job, which we did.*

Q. Did that necessitate taking out other forms?

A. Yes, we had to take those forms out and rebuild.

Q. Prior to that time, were you given the order to go ahead on the work?

A. Yes.

Q. By whom?

A. By Mrs. Gillette.

Q. When did you commence the work?

A. Approximately September 10.

Q. About when services—at the time of the original negotiations, was there anything said about materials for doing the job?

A. Yes, that was one of the items. *I told Mrs. Gillette we could not furnish the materials—they were very scarce in town. However, she told me that practically all the materials were on the job and they would furnish them if we would go ahead with the work.*

Q. You have alleged indebtedness of the defendants for certain materials. What, in a general way, are you claiming for materials?

A. *There were certain materials we were able to furnish.*

Q. Now, Mr. Gillis, those were materials which had not been available on the job?

A. Yes.

Q. And you were authorized to furnish these, were you, Mr. Gillis?

A. That is right."

Cross testimony of Mr. Gillis (Transcript of record beginning page 82):

"Mr. Cochran. On the 8th day of August, Mr. Gillis, Mrs. Gillette came to see you, I believe you stated?

A. As near as I remember, that is correct.

Q. On the 8th day of August; and she came to see you about moving the house they were living in. She wanted it moved across the street on the lot that they had purchased there; is that right?

A. That is right.

Q. Were you acquainted with Mr. Gillette?

A. No, I had heard the name, but did not know who he was.

Q. Did you know anything about Mr. Gillette's physical condition?

A. Someone told me he had hurt his leg.

Q. And was he on crutches?

A. I heard someone say something about it, but did not know anything about it.

Q. Now, when Mrs. Gillette came to see you, she came to see about getting the building moved from the south side to the north side of Front Street; is that correct?

A. That is correct, yes sir.

Q. And did she talk to you and anyone else, or just to you alone?

A. As I remember, there was no one else there at the time.

Q. That was at your place of business?

A. No, it was at the Masonic Lodge.

Q. Did you tell her that you would consider the matter or anything of that kind? Just what did you tell her?

A. As near as I can recall, I said we could not take on the work; that we had too much work and did not see how we possibly could do it, with the labor situation as it was.

Q. And you told her you could not do the job?

A. I told her I could not possibly do it at that time.

Q. Did you enter into writing at that time? The 8th of August?

A. The first time I talked to her about it, I entered into no writing. I don't know whether it was the 8th of August or not.

Q. Mr. Gillis, I will show you a photostatic copy. Is that one of your bill headings?

Mr. Tanner. If the Court please, let's have the original.

Mr. Cochran. If the Court please, I will in due time.

Mr. Tanner. Well, it seems to me there was some agreement entered—don't answer that question relative to the photostatic copy until the Court makes an order——

Mr. Cochran. I am going to use the original, Your Honor. Please examine the statement, and the writing, I am now handing you—and is that on your bill-heading? Is that your handwriting?

A. I imagine it is, yes.

Q. Did you give this to Mrs. Gillette?

A. I imagine I did—one or the other, either Mr. or Mrs. Gillette.

Q. Is that your handwriting?

A. I think it is.

Mr. Tanner. Check it over carefully and be sure, Mr. Gillis.

Mr. Cochran. Yes, I want that done too——

A. I would say that was my handwriting.

Q. Do you remember giving that to Mrs. Gillette?

A. Yes sir.

Q. On that date?

A. I don't remember the date.

Q. That is the correct date as to when it was made out—is that correct?

A. I could not swear to that.

Mr. Cochran. Now, I would like to have this marked for identification. I will offer this in evidence, Your Honor.

Court. You have had a chance to see it, have you, Mr. Tanner? Have you any objection?

Mr. Tanner. No, Your Honor.

Court. Very well. It may be admitted as defendant's Exhibit No. 1.

Mr. Cochran. Now, that statement shows 'pouring a basement'?

A. That is right.

Q. And to move the house?

A. That is right.

Q. And to complete addition to the house, as shown by a map?

A. Yes sir.

Q. You had a plat at that time, did you?

A. No sir.

Q. What did you mean then, 'Complete new addition as shown'?

A. Well, they said they had a sketch and they told me they wanted the corner of the house filled out.

Q. Did you see the sketch?

A. I think at one time I did.

Q. Does this have reference to that sketch?

A. I could not say as to that.

Q. In this, it is provided you should do no work on the interior of the old house?

A. That is right.

Q. And you were to do no plumbing?

A. That is right.

Q. No wiring?

A. That is right.

Q. No painting?

A. That is right.

Q. And all materials to be furnished by the owners?

A. That is right.

Q. And the moving was to be completed in October?

A. That is right, as near as I understood.

Q. And the price was to be \$2872.28?

A. *That was approximately as near as I could figure it at that time.*

On the 26th day of December, at 1:30 P.M., the following proceedings occurred:

Court. You may proceed in this case, Mr. Cochran——

Mr. Cochran. Yes, I am ready, Your Honor. Now, Mr. Gillis, at the time that this paper was given to Mrs. Gillette, was there a sketch of the premises—that is, what was to be done?

A. I don't know. I don't remember seeing it if there was.

Q. Well, Mr. Gillis, refresh your memory if you will, please, and see if that was given to you at the time Mrs. Gillette talked the matter over with you——

A. It was never given to me—anyway, I don't remember; it might have been given to me, but I don't remember it.

Mr. Cochran. I ask that it be entered for identification——

A. I don't remember it——

Q. Didn't you have the sketch at the time you figured on the price when you made this written statement?

A. I don't remember the sketch. I may have seen it at the time we were talking about it. It may be the one or a different one, so far as I know.

Mr. Cochran. Please mark it for identification (to clerk). Have you any sketch that you made at the time?

A. I have none.

Q. At the time Mrs. Gillette came to see you, when you were working on the Masonic Temple Building, she explained to you what they desired to have done, didn't she?

A. Approximately, yes.

Q. And were you familiar with the building at the time she talked to you?

A. I was not.

Q. Did you familiarize yourself with the building subsequently? After that time?

A. Yes sir. Yes, I took a look at it.

Q. The building extended back from Front Street over the beach sand—is that correct?

A. Yes sir."

Gillis, cross-examination continued (Transcript of record, beginning page 89):

"Q. And you understood specifically that you were not to do any work inside the old house—any carpenter work in the old house?

A. Yes.

Q. And it was specifically understood that you were to do no plumbing?

A. That is right.

Q. And no wiring?

A. That is right.

Q. And also specifically understood you were to do no painting?

A. That is right.

Q. And also understood that all materials were to be furnished by the defendants?

A. That is right.

Q. You were definite in stating that situation?

A. Yes, because we could not furnish the materials.

Q. And that was one of the reasons you were definite about it?

A. That is right.

Q. Then you said that the moving operations would be completed in October?

A. Approximately at that time; we thought then it could be done in October.

Q. You did not make any specifications?

A. The specifications were made when I talked to them.

Q. And the price for which you were to do that and complete the work was \$2872.28?

A. *That was approximately the labor cost for the job.*

Q. Did you put it on this statement—that it was ‘approximately’?

A. I did, I think.

Q. Give me the statement. Is that—did you put on the statement it was the ‘approximate cost’ or the ‘cost’? *Were they told that that would be the approximate cost?*

A. Yes.

Q. Why didn’t you put down it would be the ‘approximate cost’ on that? Why didn’t you write in that word?

A. *Because I did not consider that a contract. It was an approximate estimate.*

Q. *Well, did you tell them it was an approximate estimate?*

A. *That is right.’’*

Direct testimony of Mrs. Gillette (Transcript of record, beginning page 125) :

“Q. When did you negotiate with Mr. Gillis with reference to moving this building?

A. On approximately the 8th of August. I presume it might have been a couple of days before.

Q. Where was he when you saw him?

A. I went to the Masonic Temple and there were a lot of men working there, and I asked for Mr. Gillis and told him I wanted to see him about doing some work; and he said, ‘Come in my office’, and I had no conversation with him whatever in the Masonic Temple or at the door. He did not know at that time what it was I wanted done. I asked him if he could do some work and he said he was very busy and did not know how he could do it; and I said, ‘*Since Ben just came out of the hospital*’—well, *I rather coaxed him to do it and he didn’t say he wouldn’t.* He said, ‘*I’ll take this sketch and give you a cost on it*’, but we were not interested in the cost, and wanted the house taken care of; and I said ‘*You have been recommended to us and I don’t think I need any figures.*’ But he said, ‘*We always insist on doing that*’, and I said ‘OK’. In a day or two—I don’t remember where I was, he brought back my sketch and brought back figures, and gave it as exhibited there.

Q. I hand you Exhibit No. 1 and ask if that is all Mr. Gillis gave you?

A. That is absolutely all.

Q. Does that embody the things he was to do?

A. That is the way we understood it.

Q. And the price?

A. That is the price.

Q. I hand you defendant's Exhibit for identification, Exhibit No. 2, and ask you to examine it and state whether or not that is the plat that you refer to as having given to Mr. Gillis when you first saw him?

A. That is right, it is.

Q. And on the subsequent day, did—when he gave you Exhibit One, did he return to you this plat?

A. That is right, he did.

Q. Had that been changed in any way?

A. Not a bit.

Mr. Cochran. Now, I intended to have a larger plat of this made, Your Honor. However—now, Mrs. Gillette, will you just show the Court what additions on this plat—what was to be put on the building?

Court. I think I understand it.

Mr. Tanner. Frankly, we would like to see that too.

(Defendant pointed out to the Court the work that was to have been done.)

Mr. Cochran. Did he build the addition on the west end?

A. No.

Q. And that extended the full width of the house?

A. That is right.

Q. Is that what is referred to in the memorandum that we gave you, 'to complete the addition as shown'?

A. I would say so.

Q. And that was not completed at all?

A. No sir.

Q. And nothing was done on it?

A. No.

Q. Why?

A. *Because I told him we were not ready to do it yet. He came down to ask us if we were going to let him do our work and I said yes, but we were not going to put on the 8x30 part; we just wanted the 7x17 porch made into a dining room. We did not say anything about reducing the price at that time.*

Q. Did the price of \$2872.28—did that include building this 30 foot addition?

A. Sure.

Q. And you told him he need not build that?

A. That's right.

Q. Now, what did he build onto the building?

A. He enclosed one wall, 17 feet. He finished the end of that porch, 7 feet, by roughing it in, and put the asbestos shingles on, and the black celotex was partly on inside. It was never finished. Mr. Metrovich had to put some on when they were trying to warm the place up. There was a rough floor put in, and there was the beginning of a partition because he understood the stairway was to go from the hall space; they were to be put in exactly as they were, and I believe—I cannot recall anything else—the windows were to be in—when we did not put the back piece on, those windows and doors were put on.

Q. It was specified that no interior work on the whole house was to be done?

A. That is right.

Q. And no plumbing?

A. That is right.

Q. And no wiring?

A. That is right, no wiring.

Q. And all material furnished by you?

A. Yes. He came to us several times to ask if it was all right for him to buy it, and we said it was OK.

Q. Now, Mrs. Gillette, this states moving operations are to be completed in October. Were you definite about the time it was to be completed?

A. *Well, we know the storms occur in October, and he put that on himself, and he put that in of his own free will.*

Q. Did you make any specification about when it was to be completed?

A. I wanted it by the end of October, when we talked about putting on the 8x30 piece and he said he would not be able to complete that until the—next spring, and I said it was OK. He could not finish the interior, he did not have time, and would have to leave that perhaps.”

Mrs. Gillette, direct testimony continued (Transcript of record, beginning page 129):

“Q. How long did he tell you it would take to move the house?

A. *He did not tell me.”*

(Transcript of Record, page 130.)

“Mr. Cochran. Did you ever have any other understanding with Mr. Gillis, with reference to the moving of your house other than is stated in this memoranda which he gave you under date of August 8, 1946?

A. Do you mean—any other agreement or understanding?

Q. Yes. Did you ever have any other understanding with Mr. Gillis about the moving of the house?

A. No."

The following day, December 27, 1947, Mrs. Gillette on direct examination testified as follows (Transcript of record, beginning page 137):

"Q. Now, Mrs. Gillette, going back to the time that you were given this statement of Mr. Gillis, on the 8th day of August, was—when was that given to you?

A. Approximately a day or so after it was dated, which I don't know if it was the same day or the next day—three or four days from the time I talked to him anyway.

Q. Where did he give it to you?

A. It was in the Nome Motors office.

Q. What did he give you at that time?

A. He handed me the contract and the plan.

Q. Had that original plat or plan that has been offered in evidence—had that been altered or changed in any way?

A. No.

Q. Had you discussed that thoroughly with him before it was given to you?

A. *I would not say 'thoroughly'.*

Q. Just what did you discuss with him, Mrs. Gillette, as to what was to be done?

A. Well, I did not discuss it a great deal. It was marked quite plainly and we told him that was what we wanted done.

Q. I believe you testified that Mr. Gillis came subsequently and asked about the work, did you, Mrs. Gillette?

A. *He came two or three days later and said, 'Did you folks decide to let me do your work?'*

Q. Was Ben there?

A. Yes, he was there.

Q. Had you shown it to him?

A. Yes, I had, and talked it over.

Q. He did not come inside?

A. Just poked his head in the front door——

Q. What did you and Ben say about his going ahead?

A. We said yes, but we were not going to have the 30x8 built on. The plat showed what we were not going to have done. *We did not discuss the price* and thought we would never have any trouble with the contract.

Q. What did Mr. Gillis say with reference to the addition to be put on, the 8x30?

A. He did say, when he handed me this plan back and the contract, he said he might not be able to do the inside finishing on the 8x30 until spring. That was the main reason why we did not have it done, because we thought we would be torn up probably through the cold weather or something.

Q. What was the date when Mr. Gillis asked you to get out of the house?

A. *It was the morning of the 15th of October."*

Cross-examination of Mrs. Gillette (Transcript of record, beginning page 149):

"Mr. Tanner. Mrs. Gillette, during the storm of '45, of course your building was placed in a kind of precarious position, wasn't it?

A. Well, the bulkhead was washed out——

Q. Well, it placed it in a bad condition, didn't it—damaged possibly?

A. Sure.

Q. And that was your reason for being very anxious to get it moved?

A. Of course; that is right.

Q. Now, prior to seeing Mr. Gillis, you had had Mr. Green working on it, had you?

A. That is right.

Q. And that was when you had part of your basement dug out?

A. Yes.

Q. And he had gotten quite a bit of lumber?

A. He had ordered 6400 and some feet of lumber.

Q. Yes. Why didn't Mr. Green continue with the work?

A. He said he could not get the work done properly. His best man was on a long drunk and he said he did not see how he was going to be able to do it.

Q. And he said he would gladly pay you for any damages that may have been caused?

A. Yes——

Q. You did not have any contract with him to do the work?

A. *We did not, no.*

Q. Then after that, you go and see Mr. Gillis?

A. That is right.

Q. *And upon recommendation of friends, and so on, as to his reputation?*

A. Yes.

Q. In other words, he had a good reputation?

A. One man had told us so.

Q. In other words, as far as you could learn, he had a good reputation?

A. Well, I would rather not go into that.

Q. Well didn't you say that?

A. This one man told us that.

Q. Now, Mrs. Gillette, when you go to see Mr. Gillis the first time, he is in the Masonic Building?

A. Yes.

Q. And you speak to him at the door first?

A. I asked for him.

Q. And introduced yourself at the door, is that right?

A. Yes.

Q. And in your first conversation with Mr. Gillis, he objected to the work on the ground that he could not do it?

A. Yes, he said he was too busy.

Q. And then of course you were very anxious that it be done, weren't you?

A. That is right.

Q. And so, in a sense, you put up an argument for him to do it?

A. Well, that is a natural thing, isn't it?

Q. But you were very anxious to have the work done under the circumstances?

A. Yes, that is right.

Q. And so you went into his shop then to discuss the matter?

A. That is right.

Q. And you state that you had this little plan?

A. Yes, I did; otherwise he would not know what to tell me.

Q. Well, that was not a very good plan, was it?

A. It was as good as I could do.

Q. Prior to that time, you had given it to Mr. Green?

A. No, Mr. Green talked us into selling that house and getting a new one.

Q. And you were going to build a new home at that time?

A. Well, if we had sold this one.

Q. At any rate, Mrs. Gillette, you only considered this a rough sketch as to how you thought you would improve the old building?

A. Well, it looks rough, but it is very definite and the house shows it now, finally, with that little porch enclosed.

Q. Well, have you a bill of particulars as to just what kind of material was to be used?

A. *No, we do not.*

Q. In other words, that was to be left to your instructions?

A. I don't know that anything was said about it—you don't have a room built on with a bunch of holes in it——

Q. Well, Mrs. Gillette, there are a lot of ways to build an addition?

A. Well, we agreed to furnish the material.

Q. Then, there was nothing discussed with Mr. Gillis relative to the kind of materials that would go into the building?

A. *No, there was not.*

Q. In other words, that was left to your instructions?

A. On the contract it says so.

Q. And you were assuming it was a contract?

A. It was, as far as I was concerned.

Q. *So you had no details on the matter, except this little sketch of yours?*

A. *That is right.*

Q. And at the time when Mr. Gillis told you he was tied up with work and that he could not see his way clear to do it, you told him, of course,

that you had the materials and would furnish them, didn't you?

A. *Well, I did not know what we needed myself—I changed my mind several times.*

Q. But you did know, however, that you wanted the building moved and a general idea of what you wanted done?

A. Well, it was right there on that sketch what I wanted.

Q. Now, Mrs. Gillette, after outlining the work that you anticipated and wanted done in the emergency, didn't you ask Mr. Gillis what he thought the approximate cost of that would be?

A. No, I was too anxious to have the work done.

Mr. Tanner. Now, Mrs. Gillette——

Court. Now, please don't argue back and forth——

Mr. Tanner. Well—so you said you did not ask for any estimate at all?

A. I did not, Mr. Tanner—I have already testified to that.

Mr. Tanner. *Nor did you ask for a contract?*

A. *No sir, I did not.*

Q. Under your ideas, and so on, Mr. Gillis was to have nothing to do with the plumbing, was he?

A. No sir.

Q. And I understood you to say that Mr. Gillis did not tell you how long it would take to move the building?

A. It says on the exhibit there that it would be——

Q. I said, did he tell you—and I will ask you if this is true, you said he did not tell you how long it would take?

Mr. Cochran. I object to that. He put it that she did testify. That is assuming something that is not true——

Court. Well, don't argue about it——

Mr. Tanner. All right. Did you or didn't you state on your direct examination that Mr. Gillis did not tell you how long it would take to move the house?

A. *Well, he did not tell me.* He did not discuss this except what he wrote on that paper——on the exhibit."

Mrs. Gillette, cross-examination continued (Transcript of Record, beginning page 162):

"Q. Now, you told us under direct examination that at one time you claimed you saw Mr. Gillis in January.

A. Yes. He was sitting at the counter at the North Pole, and we did very meekly ask him when he would get at our house. We just sat at the table and asked him how he was getting along with it.

Q. Well, you say you were very meek about it——

A. Well, the only time I got mad was when he said, 'Well, I didn't want to do it any way', and I said, 'I am well aware of it'; I never got mad before.

Q. All of the time that you were so meek, during that time, you knew that the contract had been broken?

A. *Well, I did not say that—what you call a contract, I did not know that it was broken; as far as I was concerned, it wasn't.*

Q. In other words, Mrs. Gillette, you did not consider your——what we call an estimate, you did

not consider moving operations to be completed in October as a violation of contract when they weren't, did you?

A. *Well, I was not even thinking that way.* I intended to pay every cent of that \$2800 as soon as the work was finished. I could have had fourteen people as witnesses if I had had any intention of a broken contract, or had known there would be a broken contract."

Re-direct examination of Mr. Gillis (Transcript of Record, beginning page 206):

"Court. This is Defendants' Exhibit One, is it?

Mr. Tanner. Yes, your Honor.

Court. You may ask the question.

Mr. Tanner. Will you tell us how you come to give that to the defendants?

A. *As an approximate estimate of the work, as near as I could tell, so—as to what they wanted done at that time.* If they had this plan here, which we don't remember, it was so very vague I did not connect it with the house. In fact, until it was brought up in Court, I did not know that this side addition here was to be put on at any time. My opinion was that the part that was added was the part which was to be put on. I went over there to look at the house, as Mr. Gillette testified, and he showed me through the basement and this section was to be put on there, which was a rampway or a walk. That was my picture of the house all the way. I did not know until this was brought up that that 8x30 addition was to go on the east side. I may have seen those plans, but I do not remember them, and there

is a bare possibility that they were left in the shed where I was talking to Mrs. Gillette, but I did not base my approximate estimate on these plans, for the reason that there was not enough to go on, unless you know other things. I based it on what she told me about the house.

Q. Did you go over and look at the house?

A. Yes, I went over to see approximately the size of it, where it was, what the conditions were, and several other things about it; I could not begin to give a figure from a plan like that.

Q. Now, what was your intended meaning at the time you wrote this over here? It states, 'Complete new addition as shown'.

A. Well, where they showed me the additions were to go. When I went to see the house, they showed me where they were to go. I was not sure about anything and they showed me approximately where they were to go. And they did not have any plans, or what I took for a plan, but I had nothing else I could work from unless they showed me at that time what it was they wanted done there.

Q. Now Mr. Gillis, prior to the—what you call an estimate there, were you told in detail how everything was to be done?

A. No, only generally.

Q. Calling your attention, Mr. Gillis, to the last sentence where it says, 'Moving operations to be completed in October'; what did you mean?

A. At that time I thought there was a chance we could complete it in October. That was purely an estimate, for the reason I could not estimate simply how long it would take. *I had told her before that the work had to be worked in with*

*other jobs and we would try and do it, and my approximate estimate of October was to take into consideration the other work that had to be done along with that. It was not simply a matter of moving one house; we had other work also and I could give only an approximate time on that because you get fouled up on your time a lot of times.*

Q. Did you present that to the defendants—that it was to be a binding contract on you?

A. *It was merely an estimate.*

Q. Why did you present that estimate to the defendants?

A. *To give them some reasonable idea of about what that much work would cost. As Mrs. Gillette testified, when I first talked to her, the subject was brought up about price—whether she asked me I don't know, or whether I said that I would make the statement I don't know, but I would much rather people would know approximately what something would cost them to have the work done; and a good many people do not realize the price of labor and material, and we would much rather have an agreement, so they would have an approximate idea, at least, of what the thing is going to run."*

#### (1) Comment.

It is evident from the foregoing testimony that negotiations began probably August 8 (1946) and that plaintiff was not authorized to do any work until several days after; that defendants did not want a contract; that defendants' Exhibit 1 is an outline of the work discussed in original negotiations and an estimate of the labor cost; that when defendants' Exhibit

1 was left with defendants, the plaintiff had no intention that it was to form the basis of a binding contract, and that he told the defendants it was an estimate—(a fact never denied by defendants): That when plaintiff was ready to pour cement (about Sept. 10) the defendants did not have their basement and forms ready as they had stated they would have, and without any further negotiations except for defendant, Mr. Gillette, to ask plaintiff, Gillis, why he didn't go ahead and prepare the basement and forms, the plaintiff did so: That as the work progressed defendants changed their minds several times as to what they did or did not want done: That the plaintiff in performing work for defendants from time to time furnished materials and did work not anticipated during original negotiations, and merely upon the sanction of the defendants, and that throughout, *no mention was ever made of a contract. Mrs. Gillette by her own testimony did not consider the failure of plaintiff to have the house on its new foundation during the month of October a breach of contract, nor did she consider a contract broken at all as late as the month of January following cessation of plaintiff's services (Dec. 16).*

It is submitted that it was never the intention of the parties that defendants' Exhibits 1 and 2 were to form the basis of a binding contract or agreement and that no such agreement was ever entered into.

**C. LABOR AND MATERIALS WERE NOT FURNISHED BY  
VIRTUE OF SEPARATE AGREEMENTS.**

The testimony set forth herein just above under B clearly shows that, in order for the plaintiff to perform the work discussed in original negotiations, it was necessary that extra work be done and materials supplied: That the plaintiff performed the extra work and supplied materials not by virtue of any contract or agreement with the defendants but merely with their consent and approval: That the plaintiff did all this in good faith to accomplish for the defendants desired results. The actions of all parties deny that it was the intention of the parties that a binding agreement was in effect.

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**D. PLAINTIFF DID NOT WILFULLY AND WITHOUT  
CAUSE ABANDON WORK.**

During the trial of this cause Gillis repeatedly testified that he stopped performing services for the defendants by reason of order from Mrs. Gillette given on or about the 16th day of December (1946) (Transcript of Record, pages 63, 93, 106, 209, 210). *This testimony was corroborated by George Newton.* (Transcript of Record, page 118.)

Mrs. Gillette denied she stopped the services. (Transcript of Record, page 124.)

That the truth lies with Gillis and Newton is reflected from the following: That the services being rendered to the defendants by Gillis, ended December 16 (1946), stands uncontradicted on the record, and

that such was known by Mrs. Gillette, was never directly denied by her.

The only evidence in the record which indicates by inference that Mrs. Gillette did not know of work stoppage is her own testimony on direct examination. (Transcript of Record, page 124.) This testimony is to the effect that sometime in January following stoppage of work, she saw Gillis in the North Pole Bakery and asked him when he would be back on the job. But on cross-examination in reference to the same conversation she testified as follows (Transcript of Record, page 155): “\* \* \* That was why I spoke to Mr. Gillis and I said I wanted to have a birthday party there, and that I wanted to get into the house for *Christmas* and *New Years*, and then that I wanted to have this birthday party particularly. \* \* \*”

Further proof that the foregoing conversation took place in all probability prior to work stoppage December 16 are the facts that Mr. Gillette, according to his testimony (Transcript of Record, page 188) knew that the building had sagged “In December sometime,” and according to the testimony of Newton (Transcript of Record, page 117) the Gillettes during the month of January would have had in their possession a statement of materials furnished and work performed on an hourly basis by Gillis (plaintiff’s Exhibit E). *It will be observed that during the alleged conversation no mention was made of these matters.*

It appears from testimonies of Mrs. Gillette (Transcript of Record, page 125) and Mr. Gillette (Tran-

script of Record, page 177) that prior to stoppage of work they were mad at Gillis because, among other things, *his men had been working for Grant Jackson.*

It is evident, therefore, that the foregoing conversation took place not in January but before Christmas and in all probability prior to work stoppage December 16. *That the conversation did take place prior to work stoppage was the testimony of Gillis.* (Transcript of Record, page 200.)

The testimony of Mr. Gillette in reference to a call made upon Gillis in January following work stoppage is enlightening on the question immediately in point and also that he did not consider a contract broken. Following are quotations from his direct and cross testimonies:

Direct (Transcript of Record, page 167):

“Q. Now, Ben, when did you learn that Mr. Gillis was not going to do any more work on your house? When did you learn that?

A. I never learned it myself at all—I never heard it.

Q. And did you go to see him in January, Ben?

A. Yes, I did; *I waited fifteen minutes out on the street.*

Q. What time in January was that?

A. It was the latter part.

Q. This year?

A. No, last year—that is, last winter.

Q. Why did you go to see him?

A. Well, Duke was to do the plumbing down there and he said the doors would not open and

the building sagged, *and I went up to see him about that.*

Q. That was some time the latter part of January?

A. That is right.

Q. Then when did you see Mr. Gillis, Ben?

A. *After I waited fifteen minutes outside of his shop.*

Q. Was anyone else there when you saw him, Ben?

A. He came out alone.

Q. What did he say?

A. He said, 'Why hello, Ben'.

Q. What conversation did you have with him at that time?

A. Well, I told him we could not get into the house; he told me to nail a couple of 2x4's up and put under——

Q. Did he tell you at that time that Mrs. Gillette had ordered him to quit the work?

A. No, he did not.

Q. When did you hear that?

A. Not any time.

Q. Did Mrs. Gillette tell you that?

A. No, she never told me that.

Q. Now, Ben, state the full conversation you had with Mr. Gillis the latter part of January.

A. *I waited out there fifteen minutes for him to come out——*

Court. Get to the conversation——

A. *Well, the conversation was about the raising of the building over the floor and he spoke about moving the tools away and told me to nail a couple of 2x4's together and put under there, and I told him I would have to get Satterlee to*

*do something there then, and that was the last word we had."*

Cross (Transcript of Record, page 186) :

"Mr. Tanner. \* \* \* Now, Ben, you stated that you were up sometime the latter part of January to see the plaintiff?

A. I did.

Q. And you saw him in front of his shop?

A. *Yes, I waited until he came out.*

Q. And your purpose was to see if he could do some work?

A. Yes.

Q. Now he told you why he wasn't coming back?

A. He told me he took his tools away; he did not tell me why.

Q. *Didn't you ask him why?*

A. *No, I didn't."*

If Gillette did not know that work had been stopped by his wife, *why did he hesitate to approach Gillis—why standing out in the cold for fifteen minutes until Gillis left his shop and went out to him? Why did he not inquire as to the reason Gillis took his tools away? Why was his call only about raising the house or the doors would open? Why did he not mention a contract and the statement (plaintiff's exhibit E)?*

In reference to the foregoing conversation Gillis testified as follows (Transcript of Record, page 202) :

"Mr. Tanner. Tell us what that conversation was, Mr. Gillis.

A. Mr. Gillette came over and I spoke to him and he wanted to know when we were going to

be back down to his job. And I said we were not going to be there.

Q. Why?

A. *Because Mrs. Gillette had told us to forget the whole thing. He said, 'Did she say that?' He went on talking about who would do the work and I think, if I recall rightly, he might get Pete Satterlee.'*

In reference to plaintiff's exhibit E, Gillis testified as follows (Transcript of Record, page 113):

"Mr. Gillis, you testified on direct examination that defendants have been billed in reference to this account?

A. Yes, that is right.

Q. *Have they ever contacted you in reference to the account?*

A. *No sir.'*

It will be noted that the foregoing call upon Gillis was made by Mr. Gillette, not Mrs. Gillette; yet the evidence shows that Mrs. Gillette had, in the main, been spokesman for the Gillettes in reference to the services performed by Gillis. The evidence also shows that Mr. Gillette had a leg injury. Mrs. Gillette was the logical one to have called upon Gillis. *Why didn't she?* The answer is obvious. *Mrs. Gillette had stopped the work.*

The testimony given at the trial of this cause shows that the Gillettes were informed by Gillis in advance that any work he did for them would have to be wedged in between other jobs he was bound to do, that he put himself out to accommodate them, and

that the main portion of their work was done before work stoppage. *A motive for Gillis to voluntarily stop the work is remote; a motive for Gillettes to deny that they stopped the work is very evident.*

It is submitted that, after Gillis had in good faith undertaken to accommodate Gillettes, they, apparently overlooking the fact that their work was to be secondary to other work, became angry because their work was not being pushed as fast as they desired; and in this state of mind Mrs. Gillette did order the work stopped as so testified by Gillis and Newton.

According to Mrs. Gillette, she went to see Mr. Gillis because he had a good reputation (Transcript of Record, page 125 and page 150). We believe this appraisal correct.

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**E. BAD FAITH IS NOT RIGHTFULLY ATTRIBUTED  
TO PLAINTIFF.**

1) Plaintiff's work was good.

An examination of the testimony taken at the trial of this cause will show that throughout the trial defendants' counsel and the defendants made special effort to belittle the work done by the plaintiff and by inference made it appear that his work was inferior workmanship. The testimony does not sustain his point of view:

Oscar A. Margraf, defendants' witness, testified that the work he observed had been done in a "mechanical way" (Transcript of Record, page 197); Hugh F.

Paterson, plaintiff's witness, testified that the cement work was a standard pouring job (Transcript of Record, page 216); Mrs. Gillette testified that certain work that was done was good and that her main objection was that the work had not been finished (Transcript of Record, page 156).

*The defendants failed to produce any affirmative testimony to sustain their inferences that plaintiff's work in any particular was not done in a standard mechanical manner.*

**(2) Plaintiff did not leave house unbraced.**

The trial Court's finding that plaintiff left defendants' house unbraced is entirely unjustified by the evidence. After stoppage of work and before the defendants attempted to complete the work on their house, it may have sagged; but such sagging was not due to lack of bracing. It was due to the fact that until the cement was poured for the basement floor, the braces were of necessity *temporary braces which had to be grounded on frozen ground. The heat from the house furnace naturally thawed the foundation and, thus, the supports lowered* (Mr. Gillette's Testimony, Transcript of Record, page 188; Mrs. Gillette's Testimony, Transcript of Record, page 154; Mr. Gillis' Testimony, Transcript of Record, page 204).

**(3) Plaintiff did not "wantonly and negligently" fill in sump.**

The trial Court's conclusions that plaintiff "wantonly and negligently" filled in defendants' sump i

wholly unjustified by the evidence. The testimonies of Gillis and Mrs. Gillette show that it was the understanding of the parties that the Gillettes were to prepare their basement for the cement work: That when Gillis was ready to pour the cement the basement had not been prepared; *and as a favor to Gillettes Gillis hired Ben Young to haul in the back-fill* (Gillis' Testimony, Transcript of Record, page 66; Mrs. Gillette's Testimony, Transcript of Record, page 157).

4) Plaintiff did not "wantonly" cut off corner of defendants' house.

The trial Court's inference, as contained in his conclusions, that the cutting off of a corner of defendants' house was wantonly done and that plaintiff wilfully failed to repair same is not justified by the evidence. The reason for cutting off the corner and the reason it was not completely repaired were given by Gillis under cross-examination (Transcript of Record, page 91).

Mrs. Gillette testified on direct examination that the corner was cut off without her knowledge (Transcript of Record, page 146), *but under cross-examination reversed herself* (Transcript of Record, page 60).

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**F. PLAINTIFF PERFORMED WORK FOR DEFENDANTS OF THE REASONABLE VALUE OF \$2,220.75.**

The work and hours of work performed by the plaintiff for the defendants and the rate charged were testified to by Gillis (Transcript of Record, page 63). Plaintiff's exhibit A are the daily time sheets.

*The record fails to disclose any affirmative testimony to disprove the foregoing testimony of Gillis, and we believe it must stand as true and represents the reasonable value of his work.*

The reasonable value of the work performed is strengthened by the testimony of defendants' witness, Margraf, who testified that he was not a carpenter—he was a miner—and that his charge for the work he did for the defendants was at the rate of \$2.00 per hour (Transcript of Record, page 196).

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**G. DEFENDANTS' DAMAGES, IF ANY, ARE SMALL,  
THEIR BENEFITS LARGE.**

By reference to the trial Court's findings and conclusions (Transcript of Record, page 46), it will be observed that in the main the *damages allowed the defendants are the costs of completing their work. These costs are certainly not elements of damages if the theory of plaintiff's appeal be sustained.*

The evidence taken at the trial of this cause (Transcript of Record, page 59) shows that the plaintiff not only furnished to the defendants the materials and services for which the trial Court allowed him the sum of \$526.08; but, in addition, he performed labor for the defendants of the reasonable value of \$2,220.75. *The plaintiff thus bestowed benefits upon the defendants of the total reasonable value of \$2,746.87; and of this sum he has received only \$1,000.00* To date, therefore, *the defendants are enriched at the*

expense of the plaintiff in the reasonable sum of \$1,-46.83. Defendant's work was substantially performed.

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#### H. PLAINTIFF'S LIEN WAS FILED AND ACTION BROUGHT WITHIN THE TIME PROVIDED BY LAW.

Alaska Law, A. C. L. A., 1949, Sec. 26-1-1, defines those entitled to file a lien; Sec. 26-1-5 provides a 90-day period for filing lien; and Sec. 26-1-7 provides a six months' period for bringing action.

The evidence in this cause shows plaintiff's services to the defendants ended December 16, 1946; plaintiff's Exhibit B shows filing lien March 14, 1947; and clerk's endorsement on plaintiff's complaint (Transcript of record, page 6) shows action commenced September 3, 1947.

It is the contention of appellant that his services to the defendants including the furnishing of labor and materials ended December 16, 1946: *That in order to accomplish for the defendants the things they desired the labor and materials were essential, each being dependent upon the other in accomplishing the results desired by the defendants: That the labor and materials furnished were not the result of separate agreements but comprised one account against the defendants for services rendered.*

We have been unable to find anything in the record to sustain the trial Court's assumption "That all of said services and supplies were furnished between the

12th day of November, 1946, and the 15th day of December, 1946 (Transcript of Record, page 45; Findings, Sec. IV).

- (1) Liens for labor and materials are liberally construed.

*Arctic Lumber Co. v. Borden*, 211 Fed. 50;  
*Hooven, Owens & Rentschler Co. v. John Feathersone Sons*, 111 Fed. 81;  
*Russell v. Hayner*, 130 Fed. 90.

- (2) The right to a foreclosure of lien.

(See Appellant's Opening Brief, First Appeal page 10.)

- (3) Right to interest.

(See Appellant's Opening Brief, First Appeal page 9.)

- (4) Right to attorney's fees and costs.

(See Appellant's Opening Brief, First Appeal page 8, and Reply Brief, page 4.)

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## V. CONCLUSION.

We believe that the trial Court's judgment, besides being contrary to the law applicable to his findings is inconsistent with the evidence taken at the trial of the cause. The evidence, we believe, justifies only the following conclusions: The appellant is entitled to judgment not only for the materials furnished by him to the appellees and for which the trial Court ha

allowed him credit but also for the reasonable value of the labor performed, for the foreclosure of his lien on the total sum found due him, and for interest, costs, and reasonable attorney's fees.

Dated, Nome, Alaska,  
May 3, 1950.

Respectfully submitted,  
C. C. TANNER,  
*Attorney for Appellant.*

